

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
MALARKEY ASPHALT COMPANY,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No. '85-261

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

This case involving the appeal of a regulatory order issued under the state Water Pollution Control Act came on for hearing in Lacey, Washington, on March 28, 1986, before Board Member Wick Dufford. Appellant company appeared pro se through its General Manager, Thomas P. Kelly. Terese Neu Richmond, Assistant Attorney General, represented respondent agency. The proceedings were reported by court reporter Bibiana Carter.

Witnesses were sworn and testified. Exhibits were admitted and examined. Argument was heard.

1 The Board's Proposed Findings of Fact, Conclusions of Law and
2 Order were received by the parties on July 3, 1986. Appellant company
3 filed exceptions on July 23, 1986.

4 From the testimony, evidence and contentions of the parties, and
5 after consideration of the exceptions taken, the Board makes these

6 FINDINGS OF FACT

7 I

8 Appellant Malarkey Asphalt Company operates a facility which
9 produces roofing asphalt for hot mop applications. The facility is
10 located in the industrial section of Seattle along the Duwamish River.

11 II

12 Respondent Department of Ecology is a state agency with
13 responsibility for enforcing the water pollution control laws and
14 regulations applicable within the State of Washington.

15 III

16 Malarkey's product is created by combining oxygen with a
17 petrohydrocarbon material (flux). The process involves pumping air
18 through the flux in two large upright reaction tanks. This creates
19 heat. With the heat the lightest fractions evaporate and the heavier
20 portions of the light fractions are collected in a knock-down tank
21 which is adjacent to the reaction tanks.

22 In the past the heavier fractions collected in the knock-down tank
23 were sold as waste material. Some of this waste oil was apparently
24 stored elsewhere on-site before being sold. Since about a year ago,
25 the company has been recycling this material.

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER
PCHB No. 85-261

1 A number of other tanks, above and below ground, exist on the
2 Malarkey site. There is in addition a storage shed where the finished
3 product is kept in hardened form prior to distribution and an enclosed
4 repair or maintenance shop. Drums of lubricating oil are kept in the
5 shop and used in connection with maintaining the company's two tank
6 trucks and four fork lifts.

7 Two paved service roads traverse the site and the working areas of
8 the facility are largely in impervious surface. However, to the east
9 between these working areas and the Duwamish River is an area of bare
10 ground.

11 IV

12 Cooling water is applied to the reaction tanks to control the
13 temperature of the process. Below these tanks is a concrete sump
14 which catches the cooling water. Until recently, this cooling water
15 was discharged from the sump across one of the service roads to a
16 floor drain in the storage shed. This drain connected to a pipe which
17 discharged to the bare ground and ultimately the flow reached an
18 unlined pond separated from the river by an earthen berm.

19 This pond, indeed, caught all the run off from the Malarkey site
20 or crossing it, including whatever discharge flowed through a drainage
21 ditch leading from the facility's tank farm.

22 The entire site slopes toward the river. At least at some times
23 in the past, a ditch has led from the pond area directly to the river.

24 V

25 In October of 1984, as a part of a METRO study designed to

1 identify sources of toxicants in the Duwamish, samples were taken from
2 the pond behind the Malarkey site and from the adjacent river bank.

3 The investigation was focused on PCB's. Material long on file had
4 led to the suspicion that some PCB's from Seattle City Light's
5 operations might have in years past found their way into and through
6 Malarkey's process.

7 Both water and sediment samples were taken. The results showed
8 the presence of PCB's in both the turbid pond water and in the pond
9 and bank sediments. Additional analysis also resulted in the
10 detection of significant levels of zinc and significant concentrations
11 of PAH's in the soil.

12 VI

13 The PCB's, zinc and PAH's discovered in the 1984 sample analysis
14 present an environmental hazard in the concentrations found. However,
15 the sample-taking was an exercise solely in on-site data collection.
16 No effort was made to pinpoint precisely how the materials came to be
17 there. No evidence was found that present Malarkey operations
18 generate these contaminants.

19 VII

20 As a result of the 1984 inspection, Malarkey was placed high on
21 Ecology's list of facilities to be inspected thoroughly. An Ecology
22 inspector visited the site on October 4 and October 9, 1985. On
23 October 17, 1985, a formal announced inspection was made.

24 The inspections disclosed that the cooling water, by the time it
25 had crossed Malarkey's work area, had collected a considerable amount

1 of oil. The water exiting the pipe from the storage shed showed a
2 highly visible oil sheen and there was significant oil contamination
3 of the soil there.

4 Two underground tanks, one containing diesel fuel and the other
5 some gasoline, were identified. The integrity of these tanks was
6 untested. The gasoline tank was not in use. Another unused tank,
7 partially buried, was also observed. It apparently was used formerly
8 for waste oil. At the times of inspection it had no tight fitting lid
9 and was open to precipitation.

10 In the repair or maintenance shop, the inspector observed 'drums' of
11 oil and lubricants but found no drip pans or other spill control
12 system. Housekeeping at the site did not, in general, meet a high
13 standard.

14 The inspector found that the pond involved in the previous year's
15 sample-taking had been filled in the intervening time with dirt, but
16 that a trench was in place, conducting water through the old pond area
17 to a point near the river.

18 The inspector returned on November 1, 1985, and took a number of
19 photographs, verifying his observations.

20 VIII

21 The inspector concluded, and we find, that oil from the Malarkey
22 operation was migrating into both the ground water and the river at
23 the time of Ecology's inspections in 1985. Malarkey does not contest
24 this.

25 The inspector was also concerned that hazardous materials, such as
26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER
PCHB No. 85-261

1 PCB's, are migrating off-site and down river. We find this concern
2 fully justified. The area is a site of historic contamination,
3 aggravated by current practices.

4 IX

5 On the inspector's recommendation, Ecology issued Order No. DE
6 85-810 on December 10, 1985. The document asserted that the company
7 was violating laws prohibiting the discharge of oil into state waters
8 and ordered the company to take the following actions on receipt of
9 the order:

- 10 1. a. Immediately cease discharge of cooling water
11 unless discharge is to METRO sanitary system
or a permit has been issued.
- 12 b. Institute weekly measurement of all
13 underground tanks and maintain records.
- 14 2. Within 30 days.
 - 15 a. Contact METRO and determine feasibility of
discharging cooling water to the sewer.
 - 16 b. Install drip pans under all oils and
17 lubricants in the vehicle maintenance shed.
 - 18 c. Install a curb, lip, or catchment at the
19 front of the vehicle maintenance shed to
contain oils discharged while servicing
vehicles.
 - 20 d. Provide schematic of facility.
- 21 3. Within 60 days:
 - 22 a. Submit a sampling and analysis plan for
23 determining the level and extent of a
contaminant for:
 - 24 1.) the filled depression at the east end of
25 the facility,

1 2.) the contaminated area behind the storage
2 shed,

3 3.) storm drain system sediment.

4 Samples from the above shall be analyzed for
5 appropriate priority pollutants. The storm
6 drain shall be analyzed for oils and grease.

7 b. Submit an SPCC plan to U.S. EPA in accordance
8 with 40 CFR 112.

9 c. Submit plans for testing and monitoring all
10 underground tanks still in service.

11 d. Submit plans for removal and disposal of all
12 abandoned underground tanks.

13 X

14 On December 17, 1985, Malarkey appealed Ecology's Order to this
15 Board. No appeal of the items listed in paragraphs 1 and 2, quoted
16 above, was made, but the company contended it was unable to comply
17 with paragraph 3, within the time given, because of severe financial
18 problems and restrictions in staff.

19 XI

20 On February 5, 1986, the Board granted Malarkey a stay of the
21 conditions of paragraph 3 until a final decision is entered in this
22 appeal.

23 Ecology's inspector revisited the Malarkey site on February 18,
24 1986, and found progress was being made in controlling the discharge
25 of oil and in spill containment capability. The inspector
26 participated in some of the sampling required by 3a. on that day, as
27 part of an effort by DOE and METRO to save the company a portion of
the expense of that item.

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW & ORDER
PCHB No. 85-261

1 XII

2 Malarkey documented its having severe economic difficulties and
3 sharp cuts in personnel in late 1985 and early 1986. Notwithstanding
4 these problems the company had installed a system for recycling the
5 cooling water by early March of 1986, thus ceasing discharges from
6 this source. Drip pans and curbing around lubricant drums were also
7 then in place.

8 Additionally, by the time of hearing, preliminary arrangements had
9 been made for pursuing the remaining items under paragraph 3.

10 XIII

11 The company is worried that the results of the studies done
12 pursuant to paragraph 3 may ultimately lead to much greater expense.

13 XIV

14 Any Conclusion of Law which is deemed a Finding of Fact is hereby
15 adopted as such.

16 From these Findings of Fact the Board comes to these

17 CONCLUSIONS OF LAW

18 I

19 The Board has jurisdiction over these persons and this matter.
20 Chapters 43.21B RCW and 90.48 RCW.

21 II

22 The policy of the state Water Pollution Control Act as set forth
23 in RCW 90.48.010 is, in part,

24 to maintain the highest possible standards to insure
25 the purity of all waters of the state consistent with
26 public health and public enjoyment thereto, the

27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW & ORDER
PCHB No. 85-261

1 propagation and protection of wild life, birds, game,
2 fish and other aquatic life, and the industrial
development of the state....

3 The statute makes unlawful any discharges "that shall cause or tend to
4 cause pollution," RCW 90.48.080. "Pollution" is defined as a change
5 in properties "as will or is likely to" result in harm. RCW 90.48.020.
6 The entry of oil into state waters is, in general, strictly
7 prohibited. RCW 90.48.320.

8 III

9 Under RCW 90.48.120(2) Ecology may issue "such order or directive,
10 as appropriate under the circumstances" when it deems immediate action
11 necessary to accomplish the purposes of chapter 90.48 RCW. There is
12 no assertion that the situation here does not support some sort of
13 order to Malarkey from Ecology.

14 IV

15 Neither Ecology nor Malarkey can have a clear idea of the
16 company's ultimate cleanup obligation, if any, until the information
17 required in the instant Order is provided.

18 Viewing all of the evidence, we conclude that Order No. DE 85-810
19 was an entirely appropriate response to the conditions Ecology became
20 aware of at the Malarkey site.

21 V

22 Malarkey's argument that its economic hardships should result in a
23 redesign of the order is rejected. Concern over the expense of
24 pollution control, while understandable, cannot serve as an excuse for
25 failing to conform with appropriate requirements imposed pursuant to

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER
PCHB No. 85-261

1 statutory authority. See American Plating Company v. Department of
2 Ecology, PCHB No. 84-340 (January 23, 1986).

3 VI

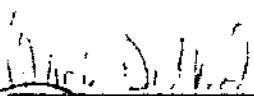
4 Any Finding of Fact which is deemed a Conclusion of Law is hereby
5 adopted as such.

6 From these Conclusions of Law the Board enters this
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ORDER

The Department of Ecology's Order No. DE 85-810 is affirmed.
DONE this 12th day of September, 1986.

POLLUTION CONTROL HEARINGS BOARD


WICK DUFFORD, Lawyer Member

 9/12/86
LAWRENCE V. FAULK, Chairman

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW & ORDER
PCH8 No. 85-261